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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF PUERTO RICO

In re:

HOTEL AIRPORT, INC.,

Debtor.

Case No. 11-06620 (ESL)

Chapter 11

**PRE-HEARING MEMORANDUM
OF BEST WESTERN
INTERNATIONAL, INC. IN
SUPPORT OF:**

**MOTION FOR ALLOWANCE AND
PAYMENT OF ADMINISTRATIVE
EXPENSE CLAIM**

Hearing Date: 4/11/14

Hearing Time: 9:30 a.m.

This Pre-hearing Memorandum is filed by Best Western International, Inc. ("Best Western"), a creditor and party-in-interest in the above-captioned Chapter 11 case of Hotel Airport, Inc. (the "Reorganized Debtor"), in connection with the April 11, 2014 hearing (the "4/11 Hearing") on the *Motion for Allowance and Payment of Administrative Expense Claim* ("Administrative Claim Motion") [Dkt. #299]. Since the parties are not submitting a joint-pre-hearing statement prior to the Hearing, this Memorandum is being filed by Best Western to assist the Court with the issues of fact and law that will be presented during the Hearing. Unless otherwise indicated, capitalized terms used in this

Memorandum will have the same meaning as the Administrative Claim Motion [Dkt. #299] and the *Joint (I) Motion For Leave To File Reply; And (II) Reply Of Best Western In Support Of The Administrative Claim Motion* (the “Reply”) [Dkt. #306].

I. RELIEF REQUESTED BY BEST WESTERN.

Best Western’s Administrative Claim Motion seeks an order from the Court (i) allowing the Administrative Expense Claim of Best Western in the amount of at least \$490,723.26 (the “Administrative Expense Claim”) incurred post-petition and pre-confirmation under the *Best Western International Membership Application and Agreement* dated March 7, 2008 (the “Membership Agreement”) in connection with the premises commonly referred to as the San Juan Airport Hotel (the “Hotel”); and (ii) directing the Reorganized Debtor to immediately pay the Administrative Expense Claim to Best Western. As demonstrated below, the Administrative Expense Claim arises from the Reorganized Debtor’s concealed and unauthorized use of the Best Western Marks after it assumed the Membership Agreement pursuant to Bankruptcy Code § 365.

For all of the reasons set forth below, in the Administrative Claim Motion and Reply, Best Western respectfully submits that it has met its burden in establishing that its Administrative Expense Claim is entitled to an administrative priority pursuant to Bankruptcy Code §§365 and 503(b)(1)(A).

II. FACTUAL AND PROCEDURAL BACKGROUND WITH CITATIONS TO THE RECORD.

The factual and procedural background supporting the Administrative Expense Claim is set forth in the *Motion And Memorandum Of Law To Dismiss Complaint Pursuant To Fed.R.Bankr. P. 7012(B)* (the “Motion to Dismiss”) filed by Best Western in the Adversary No. 13-ap-00259 (ESL) (the “Adversary”). The Motion to Dismiss chronicles the factual and procedural background relevant to this matter, with detailed citations to the record in this Bankruptcy Case for which the Court may take judicial notice of. Although the claims and causes of action asserted by the Reorganized Debtor

1 in the Adversary relate exclusively to post-confirmation claims and actions, the claims
2 and causes of action alleged nevertheless arise out of the same Membership Agreement
3 that was terminated by the Reorganized Debtor giving rise to the Administrative Expense
4 Claim. Consequently, Best Western hereby incorporates the Motion to Dismiss into this
5 Memorandum.

6 This Memorandum is further supported by: (1) the *Declaration Of Kylie Crawford*
7 *TenBrook In Support Of Administrative Expense Claim Of Best Western* attached to this
8 Memorandum as Exhibit A (the “TenBrook Decl.”); (2) the *Declaration Of Dwayne*
9 *Joseph Riccio* attached to this Memorandum as Exhibit B (the “Riccio Decl.”) and; (3)
10 the *Declaration Of Brent Edward Munson* attached to this Memorandum as Exhibit C
11 (the “Munson Decl.”).¹ Mrs. TenBrook, Mr. Riccio and Mr. Munson are all Best Western
12 employees and their sworn declarations evidence, among other things:

- 13 1. The factual validity and basis of the Administrative Expense Claim;
- 14 2. The dates used to calculate the Administrative Expense Claim; and
- 15 3. The calculation of the Administrative Expense Claim.

16 As set forth below, the remaining issues before this Court are either uncontested factual
17 issues or statutory and legal authority in support of Best Western’s Administrative
18 Expense Claim.

19 **III. ISSUES OF FACT AND LAW NOT DISPUTED BY THE PARTIES.**

20 The Reorganized Debtor does not dispute in its Objection any of the following
21

22 ¹ The Court may consider the Declarations and supporting records and documents under,
23 among other authority, Fed. R. Evid. 803(6), the business records exception to the
24 hearsay rule given that they are accompanied by a certification that: (1) they were made
25 at or near the time of the events reflected in the documents; (2) they were created in the
26 normal course of business; and (3) it is the regular course of business of Best Western to
make these records. *See* Fed.R.Evid. 803(6) (“A memorandum, report, record, or data
compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or
near the time by, or from information transmitted by, a person with knowledge, if kept in
the course of a regularly conducted business activity, and if it was the regular practice of
that business activity to make the memorandum, report, record or data compilation [are
not excluded by the hearsay]).

1 facts or legal conclusions alleged by Best Western in the Administrative Claim Motion.
2 Consequently, the Court can (and should) deem these facts and conclusions admitted by
3 the Reorganized Debtor with regard to the Administrative Claim Motion:

4 1. The Reorganized Debtor entered into the Membership Agreement with Best
5 Western. *See also* Dkt. #54 at ¶5(Reorganized Debtor’s Motion to Assume
6 Membership Agreement); and TenBrook Decl. at ¶7;²

7 2. The Reorganized Debtor assumed the Membership Agreement pursuant to
8 Bankruptcy Code § 365(a) effective December 14, 2011. *See also* Dkt. #66 (order
9 granting assumption of Membership Agreement);

10 3. When the Reorganized Debtor assumed the Membership Agreement, it
11 created an administrative obligation of its bankruptcy estate. Post-assumption, all
12 liabilities incurred by the Reorganized Debtor in performing (or breaching) the
13 Membership Agreement should be treated under the Bankruptcy Code as an
14 administrative priority expense. *See* Administrative Claim Motion at p.7-8; *see*
15 *also Bildisco*, 465 U.S. at 531-32, 104 S.Ct. 1188 (1984); *see also In re Frontier*
16 *Props., Inc.* 979 F.2d 1358 (9th Cir.1992); *In re FBI Distribution Corp.*, 330 F.3d
17 36, 42 (1st Cir. 2003); *see also, e.g., In re Hudson*, 168 B.R. at 449 (Debtor’s post-
18 assumption breach is afforded priority as an administrative expense claim under
19 11 U.S.C. § 365(g)(2)(A)); *In re Vantage Investments*, 328 B.R. 137
20 (Bankrctcy.W.D.Missouri, 2005) (bankruptcy court determined that post-
21 assumption breach of Best Western membership agreement damages were entitled

22
23 ² This Court can and should consider all statements made by the Reorganized Debtor in
24 prior motions or other memoranda filed in this Bankruptcy Case as judicial admissions.
25 *See, e.g., Baxter v. MBA Grp. Ins. Trust Health & Welfare Plan*, 958 F. Supp. 2d 1223,
26 1233 (W.D. Wash. 2013) (plaintiff not permitted by the court to abandon an argument in
a motion for summary judgment and take a different position in a later filed brief) (citing
Gospel Missions of Am. v. City of L.A., 328 F.3d 548, 557 (9th Cir.2003) (holding courts
“have discretion to consider a statement made in briefs to be a judicial admission ...
binding on ... the trial court.”); *see also Purgeess v. Sharrock*, 33 F.3d 134, 144 (2d
Cir.1994) (“A court can appropriately treat statements in briefs as binding judicial
admissions of fact.”)).

1 to administrative claim priority);

2 4. On or about July 2, 2012, Best Western notified the Reorganized Debtor
3 that it terminated the Membership Agreement (the Reorganized Debtor disputes
4 whether Best Western's termination of the Membership Agreement was effective
5 (*see infra* discussion at IV(A)-(B)); *see also TenBrook Declaration* at ¶19; and
6 Cancellation Letter attached to the Administrative Expense Motion as Exhibit 2;

7 5. The Reorganized Debtor did not remove all Best Western Marks on or after
8 July 17, 2012. Instead, the Reorganized Debtor continued to use the Best Western
9 Marks on and after July 17, 2012. *See also TenBrook Decl.* at ¶¶22-23; Munson
10 Decl. at ¶¶7-10; and Riccio Decl. at ¶¶7-12;

11 6. The Reorganized Debtor's use of the Best Western Marks benefitted its
12 bankruptcy estate. *See Administrative Claim Motion* at p.7-8;

13 7. The Reorganized Debtor failed to pay Best Western for its use of the Best
14 Western Marks on or after July 17, 2012. *See also TenBrook Decl.* at ¶35;

15 8. On March 21, 2013, the Court entered an order confirming the Reorganized
16 Debtor's plan of reorganization. *See also Dkt. #261* (the Confirmation Order);

17 9. Under the Membership Agreement (assuming the termination by Best
18 Western was valid) the Reorganized Debtor is obligated to pay \$1,994.81 per day
19 for the unauthorized use of the Best Western Marks, for a total of \$490,723.26
20 (again, assuming the termination by Best Western was valid). *See also TenBrook*
21 *Decl.* at ¶¶22 and 33; and

22 10. The Administrative Claim Motion is timely pursuant to § 503(a). *See*
23 *Administrative Claim Motion* at p.7-8.

1 **IV. ADDITIONAL EVIDENCE SUPPORTING THE AMOUNT AND**
2 **CALCULATION OF CLAIM.**

3 As detailed by the sworn declarations of Ms. TenBrook, Mr. Riccio and Mr.
4 Munson, Best Western has met its burden in establishing the amount and calculation of
5 the Administrative Expense Claim:

6 **A. Evidence Of Reorganized Debtor's Concealed and Unauthorized Use of**
7 **the Best Western Marks During the Administrative Expense Period.**

8 **(i) Unauthorized Use On August 6, 2012.**

9 1. On August 6, 2012, Mr. Riccio, Best Western Manager of Regional
10 services, visited the San Juan Luis Muñoz Marín International Airport located in San
11 Juan, Puerto Rico (the "San Juan Airport") and the Hotel. *See* Riccio Decl. at ¶7.

12 2. While at the San Juan Airport, Mr. Riccio saw the Best Western Marks
13 displayed on the sign of the Hotel facing the check-in counter for British Airways in
14 Terminal D of the San Juan Airport. *See* Riccio Decl. at ¶8.

15 3. While at the Hotel on August 6, 2012, Mr. Riccio also saw the Best
16 Western Marks displayed on at least the following Hotel items:

- 17 a. Guest shampoo bottles;
- 18 b. Guest soap wrappers;
- 19 c. Guest phones outside of the Hotel elevator;
- 20 d. Guest phones in the Hotel Lobby;
- 21 e. Telephone in Hotel room #529; and
- 22 f. Housekeeping carts.

23 *See* Riccio Decl. at ¶9.

24 4. Photographs evidencing the continued and unauthorized use of the Best
25 Western Marks by the Reorganized Debtor on August 6, 2012 are attached to the Riccio
26 Decl. as Exhibit A. *See* Riccio Decl. at ¶10.

1 (ii) **Discovery Of Unauthorized Use On June 7, 2013.**

2 5. During the week of June 7, 2013, Mr. Munson, Best Western Manager of
3 Regional services, visited the Hotel. *See* Munson Decl. at ¶7.

4 6. While at the Hotel, Mr. Munson saw the Best Western Marks displayed on
5 at least the following Hotel items:

- 6 a. Guest shampoo bottles;
- 7 b. Guest soap wrappers;
- 8 c. Guest phones outside of the Hotel elevator;
- 9 d. Guest phones in the Hotel Lobby;
- 10 e. Telephone in Hotel room #529; and
- 11 f. Housekeeping carts.

12 *See* Munson Decl. at ¶8.

13 7. Photographs evidencing the continued and unauthorized use of the Best
14 Western Marks by the Reorganized Debtor during the week of June 7, 2013 are attached
15 to the Munson Decl. as Exhibit A. *See* Munson Decl. at ¶9.

16 **B. Membership Agreement And Calculation of Claim.**

17 8. Pursuant to the Membership Agreement, the Reorganized Debtor agreed
18 that the Best Western License shall terminate upon termination of the Membership
19 Agreement. *See* TenBrook Decl. at ¶14; *see also* Membership Agreement attached to the
20 TenBrook Decl. as Ex. A, at ¶22. In the event the Membership Agreement terminated,
21 the Reorganized Debtor further agreed to “remove from public view and cease using” all
22 Best Western Marks and all other references to Best Western, and to remove any device
23 or design containing any part of any Best Western symbol, within 15 days of the date of
24 termination. *Id.*

25 9. Additionally, upon termination of the License, the Reorganized Debtor
26 agreed that it would “actively take steps as may be necessary to cause the cessation of all

1 advertising and distribution of promotional material containing any Best Western
2 Symbol.” *See TenBrook Decl.* at ¶15.

3 10. Further, under the Membership Agreement, if the Reorganized Debtor
4 failed to immediately remove all Best Western Marks by July 17, 2012, the Reorganized
5 Debtor was required to pay \$1,994.81 per day for the unauthorized post-termination use
6 of the Best Western Marks. *See TenBrook Decl.* at ¶21; *see also* Membership Agreement
7 at ¶24 (daily damages for continued post-termination use of the Best Western Marks
8 calculated at the rate of 15% of the meant of the Hotels’ room rates per room per day
9 multiplied by the total number of rooms).

10 11. Pursuant to the damages provision of the Membership Agreement, Best
11 Western calculates the damages owed by the Reorganized Debtor during the
12 Administrative Expense Period as follows:

13 Per diem damages under Membership Agreement:	\$1,994.81
14 No. of days between effective date of termination 15 of the Membership Agreement (7/18/12) and the Confirmation Date (3/21/14) or 246 days:	X 246
16 Total amount owed:	\$490,723.26

17 *See TenBrook Decl.* at ¶22; *see also Administrative Expense Motion* at p. 8. Therefore,
18 pursuant to the Membership Agreement, the Reorganized Debtor owes Best Western at
19 least \$49,723.26 for its unauthorized use of the Best Western Marks during the
20 Administrative Expense Period.

21 **V. LEGAL ANALYSIS OF LIMITED ISSUES BEFORE THE COURT.**

22 The *only* legal or factual objections raised by the Reorganized Debtor to the
23 Administrative Claim Motions are set forth in only a few paragraphs of the Objection and
24 include: (i) that Best Western’s termination of the Membership Agreement is purportedly
25 void because it violated the automatic stay of Bankruptcy Code § 362 (*see* Objection at
26

¶8 incorporating the Adversary Complaint Count Two);³ and (ii) Best Western is allegedly barred from seeking an administrative claim in connection with the Reorganized Debtor's concealed and unauthorized use of the Best Western Marks post-termination and pre-confirmation under the Stipulation and agreed form of Final Decree (see Objection at ¶¶8-16). For the reasons below these limited objections fail to rebut the clear and undisputed evidence that: (i) the Reorganized Debtor assumed the Membership Agreement; (ii) the Reorganized Debtor used the Best Western Marks during the Administrative Expense Period; (iii) the Reorganized Debtor's unauthorized use of the Best Western Marks benefitted its bankruptcy estate; and (iv) the Reorganized Debtor failed to pay Best Western for the post-termination and unauthorized use of the Best Western Marks. Consequently, for all of the reasons below, the Court can and should approve the Administrative Expense Motion over the Objection of the Reorganized Debtor:

A. Termination Of Membership Agreement Did Not Violate The Stay.

In Count Two of the Adversary Complaint, the Reorganized Debtor claims Best Western violated the automatic stay of Bankruptcy Code §362(a)(3) when it terminated the Membership Agreement. See Adversary Complaint, Dkt. #1 at pp. 10-12. The Reorganized Debtor appears to argue through its reference to the Adversary Complaint in its Objection that it disputes the termination of the Membership Agreement by Best Western. For the reasons below, termination of the Membership Agreement was valid and effective July 17, 2012.

Section 362(a)(3) prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Pre-assumption, the law is clear: Stay relief is required before a non-debtor party to a contract

³ The Objection incorporates at ¶8 the entire Adversary Complaint filed by the Reorganized Debtor. Counts One and Two of the Adversary Complaint, however, appear to be the only counts relevant to the Administrative Claim Motion or Objection.

1 may terminate a prepetition contract. Here the issue is whether the automatic stay
2 applies to the enforcement of the Best Western Membership Agreement *after* it was
3 assumed by the Debtor. Bankruptcy courts have unanimously concluded that the
4 automatic stay does *not* apply to acts done post-petition with regard to post-petition
5 property of the estate. *See e.g., In re Plexus Enter., Inc.*, 289 B.R. 778, 779 (Bankr. M.D.
6 Fla. 2002) (post-petition insurance contracts - although property of the estate - are not
7 subject to the automatic stay); *In re Hudson*, 168 B.R. 448, 449 (Bankr. S.D. Ga. 1994)
8 (“As the stay of § 362(a) does not prohibit the collection of a post-petition debt from
9 postpetition property of the debtor, stay relief was not necessary for the creditor to pursue
10 collection of its postpetition debt from property of the debtor.”). The Reorganized
11 Debtor, by and through its Objection has failed to rebut this well established case law.

12 Here, the Best Western Membership Agreement, although originally a prepetition
13 contract, was assumed by the Reorganized Debtor postpetition. This fact is not, and quite
14 frankly cannot, be disputed by the Reorganized Debtor. Upon assumption, a new
15 postpetition obligation was created and the assumed contract became *postpetition*
16 property of the estate. *See, e.g. In re Wright*, 256 B.R. 858, 860 (Bankr. W.D.N.C. 2001)
17 (Bankruptcy court held that once a prepetition contract is assumed postpetition, the
18 effects of a subsequent breach of its terms by the debtor are no longer treated as
19 prepetition obligations. “Assumption has been aptly described as: an act of
20 administration that create[s] an obligation of the postpetition bankruptcy estate which is
21 legally distinct from the obligations of the parties prior to the assumption. Any breach of
22 the assumed obligations, whether in the form of a default or a formal rejection of the
23 lease thereby constitutes a breach by the postpetition debtors of postpetition
24 obligations.”); *In re Enderle*, 352 B.R. 444, 446 (Bankr. E.D. Mich. 2006) (“A breach of
25 the assumed obligations therefore constitutes a post-petition breach of post-petition
26 obligations under 11 U.S.C. § 365(g)(2)(A), and is afforded administrative expense
priority.”). Since the assumed Membership Agreement constitutes postpetition property

1 of the estate, Best Western did not (and could not have) violated the stay when it noticed
2 termination of the agreement.

3 **B. The Reorganized Debtor Is Estopped From Challenging Termination.**

4 More importantly, the Reorganized Debtor is judicially estopped from challenging
5 the termination of the Membership Agreement. After termination of the Membership
6 Agreement, the Reorganized Debtor admitted to this Court that “[a]fter recently
7 exhausting said negotiation efforts [with Best Western], **debtor has decided** that the
8 franchise benefits are not worth the cost and requirements that Best Western insists upon.
9 Hence, debtor shall continue operating its hotel business (and effect its reorganization)
10 without being under the Best Western membership, as it has done since July 2012.”
11 [Emphasis Added] *Answer to Best Western’s Objection to Confirmation* [Dkt. #240] at ¶
12 10 (the “Admission of Termination”). This admission that the Membership Agreement
13 was terminated undermines any argument by the Reorganized Debtor that Best Western
14 somehow terminated the agreement improperly or without the express consent and
15 agreement of the Reorganized Debtor.

16 Consistent with the Admission of Termination, the Reorganized Debtor and Best
17 Western subsequently entered into the Stipulation resolving all disputed membership fees
18 for the time period in which the Reorganized Debtor assumed the Membership
19 Agreement until its termination, which was approved by the Court. *See* Dkt #280. The
20 Court’s Final Decree Order was based on Hotel Airport’s representations on the record
21 that all contested matters had been resolved and that the estate had been fully
22 administered. *Id.*, Dkt. #282. Among those matters resolved through the Bankruptcy
23 Case and prior to the Final Decree was the termination of the Membership Agreement.
24 Therefore, Hotel Airport is now and forever judicially estopped from arguing the
25 Membership Agreement was not properly terminated. *See State of N.H. v. State of*
26 *Maine*, 532 U.S. 742, 749; 121 S. Ct. 1808; 149 L. Ed. 2d 968 (2001), *citing Davis v.*
Wakelee, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895) (The purpose of the

1 concept of judicial estoppel is that, “[w]here a party assumes a certain position in a legal
2 proceeding, and succeeds in maintaining that position, he may not thereafter, simply
3 because his interests have changed, assume a contrary position, especially if it be to the
4 prejudice of the party who has acquiesced in the position formerly taken by him.”); *see*
5 *also Perry v. Blum*, 629 F.3d 1, 8 (1st Cir. 2010) (same).

6 Despite termination of the Membership Agreement, however the Reorganized
7 Debtor (as detailed in the Motion and supportive declarations attached hereto) continued
8 to benefit from the use the Best Western Marks without the knowledge or approval of
9 Best Western, and failed to compensate Best Western. Consequently, Best Western is
10 entitled to an administrative expense claim for these unpaid post-assumption, pre-
11 confirmation damages.

12 **C. The Final Decree Does Not Bar The Administrative Expense Claim Of**
13 **Best Western.**

14 Last, the Reorganized Debtor unsuccessfully argues that Best Western is barred
15 from pursuing its Administrative Expense Claim, and the Reorganized Debtor’s
16 unauthorized use of the Best Western Marks, because Best Western agreed to a form of
17 Final Decree [Dkt. #282] closing its bankruptcy case as part of an alleged settlement
18 between the parties under the Stipulation [Dkt. #278]. This argument is factually flawed
19 and contrary to the evidence before this Court. The Stipulation reached between the
20 parties with regard to the Final Decree, however, resolved *only* Best Western’s objection
21 to the entry of a final decree (the “BW Decree Objection) [Dkt. #273], and the
22 Reorganized Debtor has provided no facts to prove otherwise. The BW Decree Objection
23 was based solely on the Reorganized Debtor’s failure to pay pre-termination membership
24 fees, and had nothing to do with the Debtor’s concealed and unauthorized use of the Best
25 Western Marks. *See* BW Decree Objection at p. 2 and Exhibit A (requesting payment for
26 unpaid pre-termination membership fees outstanding as of April 17, 2013). Consistent
with Best Western’s concern about outstanding pre-termination membership fees, the

1 scope of the Final Decree agreed to between Best Western and the Reorganized Debtor
2 references only the bills attached to the BW Decree Objection, which again relate only to
3 pre-termination membership fees. Equally important, Best Western was not even aware
4 of the continuing improper use of its marks until *after* the Stipulation was executed.
5 Consequently, Best Western did not, and quite frankly could not, have even contemplated
6 a release of any of its claims for pre-confirmation infringement. Therefore, the
7 Administrative Claim Motion can and should be approved.

8 Other than the objections outlined in this Pre-Trial Memorandum, the Reorganized
9 Debtor asserts no other grounds to oppose the allowance of the Administrative Expense
10 Claim of Best Western. These objections are questions of that can (and should) be

11
12 resolved by the Court as a matter of law based on the record already before it. Therefore,
13 Best Western submits that no additional evidence is necessary at the Hearing.

14 **VI. CONCLUSION.**

15 Based on the foregoing, Best Western respectfully submits that Best Western has
16 met its burden in this case and established its entitlement to an administrative priority
17 claim in the amount of at least \$490,723.26. Therefore, Best Western requests that the
18 Court enter an order approving the Administrative Claim Motion over the Objection of
19 the Reorganized Debtor.

20 RESPECTFULLY SUBMITTED this 10th day of April, 2014.

21
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23 By: /s/ Craig Solomon Ganz

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